IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1244

JOSE AUDON SALAZAR DELGADILLO,

Petitioner,

vs.

ALBERT DEL GUERCIO, District Director, Immigration and Naturalization Service, United States Department of Justice, District No. 16,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered on January 22, 1947 [R. 83], reversing a judgment of the United States District Court for the Southern District of California.

Jurisdiction.

The judgment of the United States Circuit Court for the Ninth Circuit was entered January 22, 1947 [R. 83]. The issue as to which petitioner seeks this Court's review

involves construction of section 19(a) of the Immigration Act of February 5, 1917, 39 Stat. 889 (United States Code, Title 8, sec. 155(a)); this issue was decided favorably to petitioner in the trial court [R. 59] but adversely to petitioner, over his objection, in the Circuit Court [R. 82]. The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code, as amended.

Question Presented.

Whether petitioner is deportable under section 19(a) of the Immigration Act of February 5, 1917, on the basis that his arrival in a United States port was an "entry" within the meaning of that section, although such arrival and the departure prior thereto were wholly contrary to petitioner's volition and intention and occurred solely because the vessel on which he was a seaman was torpedoed by the enemy.

Statute Involved.

The relevant provision of section 19(a) of the Immigration Act of February 5, 1917, 39 Stat. 889, 8 U. S. C. A. 155(a),[1] is as follows:

> "* * * any alien who is hereafter sentenced to imprisonment for a term of one year or more because of a conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States * * * shall, upon the warrant of the Attorney General, be taken into custody and deported. * * *"

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[1]Hereinafter referred to as section 19(a).

Statement of the Case.

The petitioner herein filed a petition for a writ of habeas corpus in the District Court, praying therein for his release from the custody of the immigration authorities by whom he was held under a warrant of deportation purportedly issued under section 19(a).

Facts.—The uncontroverted facts, as shown by the petition and return, are that petitioner, a Mexican citizen, entered the United States when an infant accompanied by his parents in 1921 [R. 15], and resided here continuously until 1942 when he signed on as a crew member of the SS. Andrew Jackson [R. 15]. This vessel was of American registry and was then under the jurisdiction of the War Shipping Administration, which had war-time control of all United States ocean-going vessels [R. 7]. Petitioner signed on for a voyage which was specifically limited in the articles to "intercoastal," and the SS. Andrew Jackson, with petitioner aboard, departed from California for an intercoastal voyage to New York City [R. 6]. While at sea the SS. Andrew Jackson was torpedoed; after two days in a lifeboat petitioner was rescued and taken with other survivors to Havana, Cuba [R. 15]. He remained there in the care of the American Consul for one week; the War Shipping Administration then brought him by plane to Miami, Florida [R. 15]. He arrived there on July 19, 1942, and was allowed to land along with other survivors of torpedoed vessels despite their failure to possess passports or visas [R. 15].

Rulings by Immigration Authorities.—On these facts the immigration authorities found, over petitioner's argument to the contrary, that petitioner made an "entry" into the United States within the meaning of section 19(a)

when he arrived at Miami, Florida, on July 19, 1942 [R. 54].

The immigration authorities further found, and it was conceded by the petitioner, that he was convicted of robbery, a crime involving moral turpitude, committed on or about January 22, 1944, and sentenced therefor to imprisonment for a term of one year to life [R. 54].

On the basis of their finding that petitioner made an "entry" into the United States in 1942, the immigration authorities held that petitioner was deportable under section 19(a) because of the commission of the above-mentioned crime within five years after "entry" [R. 54].

Decisions Below.—The District Court ruled, without opinion, that a writ of habeas corpus directed to the immigration authorities should issue, and that they should release petitioner.

The Circuit Court reversed this judgment, ruling adversely to petitioner's contentions that his hearing before the immigration authorities was unfair and irregular, and that he had not made an "entry" into the United States within the meaning of section 19(a) when he arrived in Miami in 1942. In holding that he had on that occasion made an "entry," the Circuit Court relied in large part on this Court's statement in *United States ex rel. Volpe v. Smith*, 289 U. S. 422, 425, that an "entry" within the meaning of section 19(a) "includes any coming from a foreign country into the United States whether such coming be the first or any subsequent one" [R. 79].[2] As to

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[2]The Circuit Court also referred to *United States ex rel. Claussen v. Day*, 279 U. S. 398, and *United States ex rel. Stapf v. Corsi*, 287 U. S. 129 [R. 79], but these decisions go no further than, if as far, the *Volpe* case in support of the Circuit Court's decision.

the fact that petitioner's departure from, and arrival in, the United States in 1942 had not been intentional, the Circuit Court referred to its own decisions as the basis for holding that such lack of intention was immaterial to the question of entry [R. 79].[3]

Reasons for Granting the Writ.

1. The correct construction of section 19(a) is of great importance in the proper administration of the Immigration Act. In particular, the question of the materiality to the establishment of an "entry," within the meaning of this section, of the alien's intention to cross the borders of the United States is of vital concern to the security of the more than three million aliens in this country. While this Court has granted petitions for certiorari in order to review other phases of the construction of the term "entry,"[4] it has not considered this important question.

The Circuit Court's construction of the term "entry" is incorrect and should not be allowed to stand. It is un-

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[3]The Circuit Court's determination that an "entry" was made in 1942 rests wholly on the basis of the torpedoing and petitioner's consequent enforced stay in Cuba. It has at all times been conceded that if his intercoastal voyage had continued uninterrupted, he would not be considered to have departed from the United States or made a new "entry" when he landed at its termination. This point is established by *United States ex rel. Claussen v. Day*, 279 U. S. 398.

[4]See *Lapina v. Williams*, 232 U. S. 78; *Lewis v. Frick*, 233 U. S. 291; *Kaplan v. Tod*, 267 U. S. 228; *United States ex rel. Claussen v. Day*, 279 U. S. 398; *United States ex rel. Slapf v. Corsi*, 287 U. S. 129; *United States ex rel. Volpe v. Smith*, 289 U. S. 422.

reasonable in that it makes the fundamental right of continued residence in this country dependent upon fortuitous events and caprice. Furthermore, the decisions of this Court on which the Circuit Court relies do not support it. None of those decisions indicates that a departure and arrival, which are involuntary and unintentional and in fact are wholly contrary to volition and intention, constitute entry. And on the contrary, *Kaplan v. Tod*, 267 U. S. 228, which is not considered by the Circuit Court, shows that mere physical passage across the borders of the United States is not the only fact to be considered in determining whether "entry" has been made.

2. The Ninth Circuit Court's decision is in direct conflict with the recent decision of the Circuit Court of Appeals for the Second Circuit in the case of *J. DiPasquale v. Karnuth*, 158 F. (2d) 878. In that case the Court held, in an opinion by L. Hand, Chief Justice, that "the mere physical passage of an alien across the boundaries of the United States, regardless of any intent" does not constitute an "entry" within the meaning of section 19(a); and that the alien did not make "entry" by arriving in the United States after a departure to foreign soil when such arrival and departure were unintentional, because "the factor of intent" was not satisfied by the alien's mere acquiescence in his carriage out of and back into the United States.

The Ninth Circuit's construction of the term "entry" in the instant case is directly contradictory to the Second Circuit's construction. The Ninth Circuit states cate-

gorically that "whether or not the alien intended to land on the foreign soil or intended to return to the United States is immaterial in considering whether his return to this country constitutes an 'entry' within the Immigration Act" [R. 79]. The *DiPasquale* and the instant decisions are not only in conflict, but a contrary holding in the *DiPasquale* case is an *a fortiori* proposition from the construction adopted by the Ninth Circuit. For in the *DiPasquale* case it would at least have been possible for the alien to have possessed the intention to leave this country since he could have ascertained that the route of the carrier would have carried him out of and back into this country, while the petitioner herein could not have ascertained, even if he had attempted to do so, that he would be forced to pass across the borders of the United States.[5]

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[5]There appears to be no rational or substantial ground on which the *DiPasquale* holding and the holding in the instant case can be distinguished. The only possible distinction on the facts must at best be denominated a quibble. This distinction is that in the *DiPasquale* case the alien did not know he was departing from the United States at the moment he did so because he was then asleep, though he could have ascertained beforehand that he was to so depart; while in the instant case the alien was aware of such departure at the time thereof (that is, when he was rescued from the torpedoed vessel) though he could have ascertained beforehand only that it was possible he would so depart. The contradictory holdings did not, and can not rationally, however, be tied to such a distinction. In both cases the Court considered the actual state of mind of the alien; in both cases the actual mental state was identical in that the alien did not know that he would, and did not intend to, depart from the United States, and in both, it may be added, the alien was powerless to prevent his departure at the moment it occurred. In one case this state of mind was held to preclude an "entry," and in the other it was held not to do so.

ARGUMENT

IN SUPPORT OF CONTENTION THAT THE CIRCUIT COURT'S DECISION IS ERRONEOUS.

The Circuit Court's Construction of the Term "Entry" in Section 19(a) Is Unreasonable and Is Not Supported by the Decisions of This Court.

There is nothing in the legislative history of the Immigration Act indicative of the meaning of the term "entry" in so far as materiality of intent is concerned. And though the connotation of deliberation which the term bears lends support to the Second Circuit's construction, consideration of the word's ordinary usage and implications cannot be relied upon as persuasive of the correctness of either the Second or the Ninth Circuit's construction. Accordingly, resort must be had to the reasonableness of the term's possible constructions in order to determine the congressional intent.

The unreasonableness of the construction of section 19(a) which the Ninth Circuit adopted in the instant decision seems to us well-expressed in the opinion of L. Hand, Chief Justice, in the *DiPasquale* case. In that case the alien only intended to travel from one point to another within the United States, and did not have knowledge of the fact that the railroad on which he embarked was to carry him out of and back into this country. In holding that the alien did not make an "entry" when he returned to this country, the Court said:

> "If the word, 'entry,' in the statute extends to the mere physical passage of an alien across the boundaries of the United States, regardless of any intent, the order [of deportation under section 19(a)] was

right; but, if so, an alien who is arrested or abducted, and carried against his will out of the country and then back again into it, makes an 'entry.' * * * On the other hand, if the necessary intent demands knowledge by the alien that the route which he is to take will carry him across our borders, then DiPasquale did not enter when, asleep, he came into Detroit.

"* * * Were it otherwise, the alien would be subjected without means of protecting himself to the forfeiture of privileges which may be, and often are, of the most grave importance to him. He would be charged with the duty, every time he set foot upon a public conveyance to inform himself of its projected journey. Even if aliens were adequately advised of the danger, this would be a serious, and quite useless, burden to impose upon them, but there is nothing to advise them, and the duty would in practice become a trap, whose closing upon them would have no rational relation to anything they could foresee as significant. We cannot believe that Congress meant to subject those who had acquired a residence, to the sport of chance, when the interests at stake may be so momentous.

"* * * concededly he (the alien) was not subject to deportation except for his journey between Buffalo and Detroit; he had a vested interest in his residence, which could not be impaired so long as he avoided another conviction. That interest is now to be forfeited because of perfectly lawful conduct which he could not possibly have supposed would result in anything of the sort. Caprice in the incidence of punishment is one of the indicia of tyranny, and nothing can be more disingenuous than to say that deportation in these circumstances is not punishment. It is well that we should be free to rid ourselves of those who

abuse our hospitality: but it is more important that the continued enjoyment of that hospitality once granted, shall not be subject to meaningless and irrational hazards."

The reasonableness of the Second Circuit's construction is fully as apparent upon the facts of the instant case as upon those of the *DiPasquale* case. For not only was petitioner forced to cross the borders of the United States against his will and intention, but he was so forced because of his performance of war service which this Government urgently needed. Surely his punishment for the fortuitous consequence of such service would be capricious.

As against Justice Hand's persuasive reasoning in support of the Second Circuit's construction, the Ninth Circuit in the instant opinion has pointed to no ground in support of its construction of the term "entry" but rests it on its previous decision in *Taguchi v. Carr*, 62 F. (2d) 307. In that decision, however, the Ninth Circuit had ruled that intention was immaterial solely on the basis that it was "compelled" to its conclusion, which it recognized as "unfortunate," by the decisions of this Court. But this Court has not held or intimated that an entry includes an involuntary departure and arrival. In all of the cases in which this Court has held that an "entry" includes an arrival subsequent to the original one—the *Lapina, Lewis, Claussen, Stapf* and *Volpe* cases (all cited *supra*, note 4)—the aliens departed from the United States and returned to it with complete foreknowledge and

intention as to their destinations. As Justice Hand pointed ont in the *DiPasquale* case, the only one of these decisions having any bearing on the question of the materiality of intention is *Claussen v. Day*, and that decision "so far as it counts at all, counts in DiPasquale's favor." The only other relevant decision appears to be *Kaplan v. Tod*, 267 U. S. 228. There this Court's holding that an alien had not effected an "entry" merely by virtue of her physical passage into the United States demonstrates that factors other than such passage may be relevant.[6]

It is to be noted that this Court has not considered, in any of its opinions on re-entry the harsh effect, to which Justice Hand adverts, of its rulings therein that an "entry" may include an arrival subsequent to the original one. The opinion from which all these rulings stem only considered its rationale in relation to exclusion and stated merely that "none of these excluded classes * * * would be any less undesirable if previously domiciled in the United States" (*Lapina v. Williams*, 232 U. S. 78, 92). For the purposes of a reversal of the Circuit Court in the instant case, it is not necessary to contend for, and we are not contending for, a re-examination of this Court's rulings that an "entry" may include an arrival subsequent to the original one; but we advert to the harshness of this ruling for the reason that mindfulness of this point underscores the unreasonableness of the further extension of

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[6]In that case the alien had been ordered excluded, but had been allowed to land due to the exigencies of war, and had resided in the United States for over ten years. She was nevertheless held not to have "entered" within the meaning of the Immigration Act,

the rule evolved by the Ninth Circuit. For even when the alien intentionally departs and returns, as he did in the cases heretofore before this Court, the rule that his return is an "entry" inflicts a hardship which it may be doubted that Congress intended.[7] The provision as to deportation for a crime committed within five years of entry is in effect a provision for a probationary period within this country. It seems dubious that such a probationary period should recommence with every departure and arrival, even though intentional, despite the alien's prior service of the period. And the view that a period of residence in this country does not affect the desirability of deportation is highly questionable, if any heed is to be paid to the processes of assimilation and the effect of residence, which appear to be postulates of the immigration law.

If the rule as to subsequent arrivals is extended so as to apply to the case of an unintended departure and arrival, as the Ninth Circuit has done, it would seem to lose all basis in reason.

The Ninth Circuit has taken the most extreme position possible as to lack of intention in the instant decision, for the alien not only did not intend to depart from this country but could not have so intended because he could not have ascertained that he would be forced to so depart. Thus, the instant case is similar to the hypothetical one

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[7]Though Congress re-enacted section 19(a) subsequent to this Court's decisions that an arrival subsequent to the original one may constitute "entry," this is not conclusive as to the section's proper construction. See *Girouard v. United States*, 328 U. S. 61.

posed by Justice Hand when he says in the *DiPasquale* case:

> "We do not understand that the Director of Immigration takes this extreme position * * * (that) an alien who is arrested or abducted, and carried against his will out of the country and then back again into it, makes an entry."

The petitioner herein was as much caused to depart from the United States by force as if he had been arrested or abducted. In fact, the position of the immigration authorities in the instant case is even more extreme and unfair to the alien than in the case posited by Justice Hand, for the force exerted against petitioner was that of enemy action to which he was exposed because of war service for this Government.

Finally, we respectfully submit that the Ninth Circuit's statement that petitioner is being deported because of his commission of a crime and not "because the exigencies of war forced him to land in Cuba" is an evasion of the issue; it is clear that but for the petitioner's being forced onto foreign soil by the exigencies of war he would not have been held deportable under section 19(a).

It is to be observed that immigration and other governmental authorities were well aware of the exigencies of war, and did not view petitioner as making an "entry," when he was permitted to land in Florida after the torpedoing of his ship. The exigencies of war, and their unavoidable and unintended effect, should not now render him deportable.

Conclusion.

Wherefore, it is respectfully requested that the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit be granted.

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